STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AMERICAN INSURANCE ASSOCIATION, Petitioner, vs. DEPARTMENT OF REVENUE, Respondent.	)	Case No. 97-0323RP
FLORIDA INSURANCE COUNCIL, Petitioner, vs. DEPARTMENT OF REVENUE, Respondent.	)	Case No. 97-0588RP
ALLIANCE OF AMERICAN INSURERS, Petitioner, vs. DEPARTMENT OF REVENUE, Respondent.	)	Case No. 97-0632RP
LIBERTY MUTUAL INSURANCE COMPANY, Petitioner, vs. DEPARTMENT OF REVENUE, Respondent.	)	Case No. 97-0655RP

FINAL ORDER

On July 1, 1997, a formal administrative hearing was held in this case in Tallahassee, Florida, before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner Liberty Mutual Insurance Company:	Douglas A. Mang, Esquire Paul A. Shapiro, Esquire Mang Law Firm, P.A. 660 East Jefferson Street Tallahassee, Florida 32301
For Petitioner American Insurance Association:	Richard E. Coates, Esquire Paul Ezatoff, Esquire Katz, Kutter, Haigler, Alderman, Marks, Bryant & Yon, P.A. 106 East College Avenue Tallahassee, Florida 32301
For Petitioner Alliance of American Insurers:	James C. Massie, Esquire Massie & Scott, P.A. Barnett Bank Building 315 South Calhoun Street Tallahassee, Florida 32301
For Respondent State of Florida Department of Revenue:	James F. McAuley, Esquire Elizabeth Bradshaw, Esquire Assistant Attorneys General Department of Legal Affairs The Capitol, Tax Section Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUES

The issues in these proposed rule challenge proceedings are whether the Department of Revenue's Proposed Rules 12B-8.003 and 12B-8.016 and Proposed Forms DR-907 and DR-908 constitute invalid exercises of delegated legislative authority.

Essentially, the proposed rules and forms respond to the decision in Department of Revenue vs. Zurich Insurance Company,

667 So. 2d 365 (Fla. 1st DCA 1995)(Zurich), and state: (1) that workers' compensation administrative assessments (WCAA) imposed under Section 440.51(5), Florida Statutes (1995), are "special purpose obligations or assessments imposed in connection with" workers' compensation insurance; (2) that the retaliatory tax under Section 624.5091, Florida Statutes (1995), does not apply as to WCAA; (3) that WCAA are treated as deductions from the insurance premium tax imposed under Section 624.509, Florida Statutes (1995), as provided in subsection (7) of that statute, and are not added back in, for purposes of calculating retaliatory taxes.

The positions taken in the various proposed rule challenges include: (1) Zurich was wrongly decided or no longer controlling, and WCAA are not "special purpose obligations or assessments imposed in connection with" workers' compensation insurance; (2) as a matter of statutory interpretation, even if WCAA are "special purpose obligations or assessments imposed in connection with" workers' compensation insurance, WCAA are not to be deducted from insurance premium taxes, or are to be added back, for purposes of calculating retaliatory taxes; (3) if not so interpreted, the proposed rules and forms violate the equal protection clause of the United States Constitution; (4) the published notice of the proposed rules and forms was fatally defective; and (5) the proposed rules and forms cannot be applied retroactively.

PRELIMINARY STATEMENT

Between January 27 and February 11, 1997, the American Insurance Association (AIA), the Alliance of American Insurers (AAI), the Florida Insurance Council (FIC), and Liberty Mutual Insurance Company (LMIC) each filed separate petitions challenging the Department of Revenue's Proposed Rule 12-8.003(1), Florida Administrative Code, together with Proposed Forms DR-907 and DR-908 and instructions, and Proposed Rule 12B-8.016, Florida Administrative Code. The proposed rule-challenge petitions were given the following Division of Administrative Hearings (DOAH) Case Numbers: 97-0323RP; 97-0588RP; 97-0632RP; and 97-633RP. The cases were consolidated for further proceedings.

On March 19, 1997, leave was granted for AIA to file an Amended Petition to Determine Invalidity of Proposed Rules.

On May 28, 1997, FIC filed a Notice of Voluntary Dismissal.

The parties filed a Prehearing Stipulation of Facts on June 13, 1997, asserting that there were no disputed issues of fact remaining to be determined in this proceeding. Nonetheless, final hearing was convened as scheduled on July 1, 1997, to permit legal argument and amplification of the parties' positions.

Two requests for official recognition filed by AIA were granted at final hearing. Neither AIA, AAI, nor LMIC called a witness at final hearing; the Department of Revenue (DOR) called

one witness—its employee, Paul Munyon.

The DOR ordered the preparation of a transcript of the final hearing, which was filed on July 14, 1997. The parties requested and were given until August 8, 1997, in which to file proposed final orders.

All parties timely filed proposed final orders. LMIC also filed an alternative proposed final order and a memorandum in support. The DOR amended its proposed final order and also filed a supporting memorandum of law and a Request for Judicial Notice

of a state circuit court final judgment, which was not opposed and is granted.

The findings of fact in this Final Order included those found in the Prehearing Stipulation of Facts, plus additional findings regarding legislative history based on AIA's subsequent requests for official recognition.

STIPULATED FINDINGS OF FACT

1. Section 624.5091, Florida Statutes[1] is Florida's retaliatory tax statute. Section 624.5091 states in part:

> 624.5091 Retaliatory provisions, insurers.--
>
> (1) When by or pursuant to the laws of any other state or foreign country any taxes, licenses, and other fees, in the aggregate, and any fines, penalties, deposit requirements, or other material obligations, prohibitions, or restrictions are or would be imposed upon Florida insurers or upon the agents or representatives of such insurers, which are in excess of such taxes, licenses, and other fees, in the aggregate, or which are in excess of the fines, penalties, deposit requirements, or other obligations,

prohibitions, or restrictions directly imposed upon similar insurers, or upon the agents or representatives of such insurers, of such other state or country under the statutes of this state, so long as such laws of such other state or country continue in force or are so applied, the same taxes, licenses, and other fees, in the aggregate, or fines, penalties, deposit requirements, or other material obligations, prohibitions, or restrictions of whatever kind shall be imposed by the Department of Revenue upon the insurers, or upon the agents or representatives of such insurers, of such other state or country doing business or seeking to do business in this state. In determining the taxes to be imposed under this section, 80 percent of the credit provided by s. 634.509(5), as limited by s. 624.509(6) and further determined by s. 624.509(7), shall not be taken into consideration.

* * *

(3) This section does not apply as to personal income taxes, nor as to sales or use taxes, nor as to ad valorem taxes on real or personal property, nor as to reimbursement premiums paid to the Florida Hurricane Catastrophe Fund, nor as to emergency assessments paid to the Florida Hurricane Catastrophe Fund, nor as to special purpose obligations or assessments imposed in connection with particular kinds of insurance other than property insurance, except that deductions, from premium taxes or other taxes otherwise payable, allowed on account of real estate or personal property taxes paid shall be taken into consideration by the department in determining the propriety and extent of retaliatory action under this section[2] (emphasis added).

2. Section 624.509, Florida Statutes, is Florida's premium tax statute. Section 624.509 states in part:

624.509 Premium tax; rate and computation.--

(1) In addition to the license taxes provided for in this chapter, each insurer shall also annually, and on or before March 1 in each year, except as to wet marine and transportation insurance taxed under s. 624.510, pay to the Department of Revenue a tax on insurance premiums, risk premiums for title insurance, or assessments, including membership fees and policy fees and gross deposits received from subscribers to

> reciprocal or interinsurance agreements, and on annuity premiums or considerations, received during the preceding calendar year, the amounts thereof to be determined as set forth in this section . . .
>
> * * *
>
> (7) Credits and deductions against the tax imposed by this section shall be taken in the following order: deductions for assessments made pursuant to s. 440.51; . . . .

3. Respondent, Department of Revenue, is the agency presently charged with the administration of the tax law in the State of Florida, including those provisions set forth in Section 624.509 (Florida's premium tax) and Section 624.5091 (Florida's retaliatory tax).

4. Section 624.605(1)(c), Florida Statutes states:

> (1) "Casualty Insurance" includes:
>
> * * *
>
> (c) Workers' compensation and employer's liability. Insurance of the obligations accepted by, imposed upon, or assumed by employers under law for death, disablement, or injury of employees.

5. Section 440.51 establishes Florida's Workers' Compensation Administrative Assessment. Section 440.51 states in part:

> 440.51 Expenses of administration.--
>
> (1) The division shall estimate annually in advance the amounts necessary for the administration of this chapter, in the following manner.
>
> * * *
>
> (b) The total expenses of administration shall be prorated among the insurance companies writing compensation insurance in the state and self-insurers.

> The net premiums collected by the companies and the amount of premiums a self-insurer would have to pay if insured are the basis for computing the amount to be assessed . . . .
>
> * * *
>
> (5) Any amount so assessed against and paid by an insurance carrier, self-insurer authorized pursuant to s. 440.57, or commercial self-insurance fund authorized under ss. 624.460-624.488 shall be allowed as a deduction against the amount of any other tax levied by the state upon the premiums, assessments, or deposits for workers' compensation insurance on contracts or policies of said insurance carrier, self-insurer, or commercial self-insurance fund.

6. The Department of Insurance administered Florida's retaliatory tax provision from 1959 to 1988. (The Department of Insurance forms are attached to the Prehearing Stipulation of Facts as Exhibit "A".)

7. The legislature transferred the administration of Section 624.5091 to the Department of Revenue in 1989.[3]

8. The Department of Revenue subsequently drafted Rule 12B-8.016(3)(a)4., Florida Administrative Code, which was adopted March 25, 1990.

9. 12B-8.016(3)(a)4, Florida Administrative Code stated:

> 12B-8.016 Retaliatory Provisions.
>
> * * *
>
> (3)(a) Other items which shall be included in the retaliatory calculations are:
>
> * * *
>
> 4. The workers compensation administrative assessment imposed by s. 440.51, Fla. Stat., as well as comparable assessments in other

states.

10. Zurich Insurance Company (Zurich), a New York domiciled company, filed a petition to challenge Rule 12B-8.016(3)(a)4. on September 13, 1994.[4]

11. The DOAH Hearing Officer issued a Final Order on December 13, 1994. (A copy of the Final Order is attached to the Prehearing Stipulation of Facts as Exhibit "B".)

12. The Department of Revenue appealed the Hearing Officer's Final Order to the First District Court of Appeal (First DCA).

13. The First DCA affirmed the Hearing Officer's ruling in Department of Revenue vs. Zurich Insurance Company, 667 So. 2d 365 (Fla. 1st DCA 1995).

14. After the First DCA decision in Department of Revenue vs. Zurich Insurance Company, the Department of Revenue proposed Rules 12B-8.003 and 12B-8.016, Florida Administrative Code.

15. The Department began its internal rule making process May 30, 1996.

16. The Department held two rule development workshops where language addressing the disputed rule was discussed. The first was held July 16, 1996, with the language and notice of the workshop published in Volume 22, Number 26, June 28, 1996, Florida Administrative Weekly. The second was held November 15, 1996, with the language and notice of that workshop published in Volume 22, Number 44, November 1, 1996, Florida Administrative

Weekly. Representatives of Petitioners attended these workshops. (Drafts of the proposed rules as discussed during the workshops are attached to the Prehearing Stipulation of Facts as Exhibit "C".)

17. The proposed rules, as challenged, were published on December 27, 1996, in Volume 22, Number 52, Florida Administrative Weekly. Additionally, Proposed Rule 12B-8.003 was also published with notice of change on February 21, 1997, in Volume 23, Number 8, Florida Administrative Weekly.

18. Section 120.54(3)(a)1., Florida Statutes, states:

> (3) ADOPTION PROCEDURES.--
>
> (a) Notices.--
>
> 1. Prior to the adoption, amendment, or repeal of any rule other than an emergency rule, an agency, upon approval of the agency head, shall give notice of its intended action, setting forth a short, plain explanation of the purpose and effect of the proposed action; the full text of the proposed rule or amendment and a summary thereof; a reference to the specific rulemaking authority pursuant to which the rule is adopted; and a reference to the section or subsection of the Florida Statutes or the Laws of Florida being implemented, interpreted, or made specific. The notice shall include a summary of the agency's statement of the estimated regulatory costs, if one has been prepared, based on the factors set forth in s. 120.541(2), and a statement that any person who wishes to provide the agency with information regarding the statement of estimated regulatory costs, or to provide a proposal for a lower cost regulatory alternative as provided by s. 120.541(1), must do so in writing within 21 days after publication of the notice. The notice must state the procedure for requesting a public hearing on the proposed rule (emphasis added).

20. The Department of Revenue published the following statement of purpose and effect of proposed amendments to Rule

Chapter 12B-8, Florida Administrative Code, in Volume 22, Number 52, December 27, 1996, Florida Administrative Weekly:

> PURPOSE AND EFFECT: The proposed amendments to Rule Chapter 12B-8, F.A.C., are needed to implement various recent court decisions, delete obsolete language, provide definitional language concerning "multiperil insurance," and clarify which insurers are subject to the tax imposed under s. 624.509, F.S., and how they are to calculate taxable premiums and allowable credits (emphasis added).

21. The Department of Revenue published the following summary of the proposed changes to Rule Chapter 12B-8, Florida Administrative Code, in Volume 22, Number 52, December 27, 1996, Florida Administrative Weekly:

> SUMMARY: Rule 12B-8.001, 8.002, and 8.016, F.A.C., are amended in order to conform the rule to recent court decisions. Additionally, Rules 12B-8.001, 8.006, 8.015 and 8.016, F.A.C., are revised to incorporate statutory or procedural changes made since the last rule revision and to delete obsolete language within these rules. Also, references made to Department forms in Rule 12B-8.003, F.A.C., are updated to reflect the current version. Finally, Rule 12B-8.006, F.A.C., is amended to incorporate a clarifying definition.

22. The Notice of Change to Proposed Rule 12B-8.003, as published in, Volume 23, Number 8, February 21, 1997, Florida Administrative Weekly states in pertinent part:

> (1) Tax returns and reports shall be made by insurers on forms prescribed by the Department. The Department prescribes Form DR-907, Florida Department of Revenue Insurance Premium Quarterly Tax Return, dated January 1997 --May 1993-- and Form DR-908, Florida Department of Revenue Insurance Premium Quarterly Tax Return, dated January 1997 --January 1993--, and accompanying instructions as used for the purpose of this chapter and hereby incorporates these forms by reference.

(Copies of Proposed Rule 12B-8.003 as originally proposed,

Department of Revenue 1995 insurance premium tax instructions and forms, and Department of Revenue 1997 insurance premium tax instructions and forms are attached to the Prehearing Stipulation of Facts as composite Exhibit “D”.)

23. Schedule I of proposed form DR 908 (revised 1/97) would be used to calculate a foreign or domestic insurer’s total premium tax due (before credits).

24. Schedule VI of proposed form DR 908 (revised 1/97) would be used by foreign and domestic workers’ compensation insurers to calculate a credit that would be received against the foreign or domestic insurer’s premium tax for having paid the workers’ compensation administrative assessment.

25. Schedule III of proposed form DR 908 (revised 1/97) would be used to calculate all of the credits against a foreign or domestic insurer’s premium tax liability. Line 1 of that schedule is for the workers’ compensation administrative assessment credit from Schedule VI. If a foreign or domestic insurer has paid the workers’ compensation administrative assessment, Schedule III provides for a credit against its premium tax for that payment.

26. All the information from the various schedules would be brought forward to proposed form DR 908. Line 2 of proposed form DR 908 would provide for the total credits from Schedule III (including credit for the workers’ compensation administrative assessment) to be subtracted from the foreign or domestic

insurer's total premium tax due.

27. Schedule XIV of proposed form DR 908 (revised 1/97) would be entitled "Retaliatory Tax Computation." This schedule would be completed by foreign insurers to determine retaliatory tax due under Section 624.5091.

28. Schedule XIV of proposed form DR 908 (revised 1/97) does not include a line for Florida's workers' compensation assessment (or any other state's workers' compensation assessment) nor any provision for an add back of the credit for the workers' compensation administrative assessment in the calculation of an insurer's retaliatory tax.

29. Proposed forms DR 907 and DR 908 (revised 1/97) would not be retroactive and would operate prospectively from January 1, 1997.

30. Proposed Rule 12B-8.016 states in pertinent part:

> (3)(b) Special purpose obligations as used in this rule means those obligations or assessments the funds from which are for the benefit of certain parties, and not for the benefit of all citizens generally. Generally, such obligations will not materially involve general tax revenues, appropriated funds or state monies.
> 1. Using this definition, the following Florida assessments, as they are currently described in the Florida Statutes, would be considered special purpose obligations:
> a. Workers' compensation administrative assessment.
> b. Workers' compensation special assessment.
>
> c. Florida Life and Health Guarantee Association assessment.
> d. Florida Insurance Guarantee Association assessment.
> e. Florida Comprehensive Health Association assessment.

> f. State Fire Marshal regulatory assessment.
> g. State Fire Marshal college surcharge.
>
> 2. Since s. 624.5091(3), F.S., provides that special purpose obligations or assessments imposed in connection with particular kinds of insurance other than property insurance are to be excluded from the retaliatory tax calculation, only State Fire marshal regulatory assessment, the State Fire Marshal college surcharge, and the portion of the Florida Insurance Guaranteed Association assessment that was imposed upon the insurer's property insurance policies, can be included in the retaliatory tax calculation. The workers' compensation fund's administrative and special purpose assessments, and the Florida Life and Health Guarantee Association Special assessment cannot be included in the retaliatory tax calculation since the assessments are imposed on insurance other than property insurance. . . .[5]

31. American Insurance Association (AIA), Florida Insurance Council (FIC), Liberty Mutual Insurance Company (LMIC), and Alliance of American Insurers (AAI) filed petitions to challenge the validity of certain provisions of the above proposed rules.

32. The rule challenges of each of the Petitioners were consolidated for final hearing in a February 26, 1997 Order by Administrative Law Judge, J. Lawrence Johnston.

33. FIC voluntarily dismissed its petition challenging the above proposed rules on May 27, 1997.

34. AIA and AAI are national trade organizations. Some of the members of each of AIA and AAI are foreign and domestic insurers licensed and authorized to transact property and casualty insurance in the State of Florida pursuant to the Florida Insurance Code. Some of their members transact, among other insurance coverages, workers' compensation insurance in the

State of Florida.

35. LMIC is an insurance company domiciled in the state of Massachusetts that writes workers' compensation insurance in the State of Florida.

36. LMIC, AIA and AAI, or some of their members, as foreign insurers doing business in the State of Florida, are subject to the provisions of Florida's retaliatory tax, Section 624.5091 and Florida's workers' compensation laws.

37. LMIC, AIA and AAI, or some of their members, pay workers' compensation administrative assessments.

38. LMIC's, AIA's, and AAI's interests, or the interests of some of their members, are substantially affected by the Department of Revenue's proposed rules 12B-8.003 and 12B-8.016.

ADDITIONAL FINDINGS OF FACT

39. House of Representatives Insurance Committee Final Staff Analysis of CS/CS/CS/HB 336 (1989) contains the following example in Section II.D:

D. FISCAL COMMENTS:

The following is an example of an out-of-state Property & Casualty Company's tax calculations under the provisions of this bill (assuming the company's state of domicile imposes a 2.0% rate).

Total Premiums Written in Florida		$1,000,000
Premium Tax Rate		x 1.75%
Gross Premium Tax		$17,500
Credit for Municipal Taxes		($5,000)
Credit for Workers' Comp. Assessments		($5,000)
Net Premium Tax		$7,500
Payroll Paid to Eligible Florida Employees		$30,000
Factor for calculating Maximum Salary Credit		x 15%
Maximum Salary Credit		$4,500
Net Premium Tax		$7,500
Factor for Calculating Maximum Combined Credit for Salaries and Corporate Income Taxes Paid		65%
Maximum Combined (Salary plus CIT) Credit		$4,875
Corporate Income Taxes Paid in Previous Year		($2,200)
Usable Salary Credit (Cannot Exceed Maximum Salary Credit)		$2,675

Net Premium Tax	$7,500	
Corporate Income Tax Credit	($2,200)	
Usable Salary Credit	($2,675)	
Total Premium Taxes (Paid to GR)		$2,625
Probable Tax from Retaliation against Salary Credit ($2,675 x 20%)	$535	
Retaliatory Taxes from the Rate Differential ($1,000,000 x .25%)	$2,500	$3,035
Total Premium and Retaliatory Taxes Paid to General Revenue		$5,660

40. House of Representatives Committee on Finance & Taxation Bill Analysis and Economic Impact Statement of PCB FT 94-12 (1994), stated that the 1994 amendments to Section

624.5091, Florida Statutes (1993), had no fiscal impact.

41. The amount of workers' compensation administrative assessments may vary. Currently, the amount of workers' compensation administrative assessments exceeds premium taxes, which limit the amount allowed as a deduction against premium taxes under section 440.51(5), Florida Statutes.

CONCLUSIONS OF LAW

42. Under Section 120.56(2), Florida Statutes (Supp. 1996):

> The [proposed rule challenge] petition shall state with particularity the objections to the proposed rule and the reasons that the proposed rule is an invalid exercise of delegated legislative authority. The agency then has the burden to prove that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised.

43. The Petitioners in these proceedings contend variously that the DOR's proposed rules and forms at issue are invalid under Section 120.52(8)(a)-(c) and (e)-(f), Florida Statutes (Supp. 1996), which provides:

> Invalid exercise of delegated legislative authority" means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
> (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;
> * * *

(e) The rule is arbitrary or capricious;
(f) The rule is not supported by competent substantial evidence . . ..

44. Sections 120.52(8) and 120.536(1), Florida Statutes (Supp. 1996), both also provide:

> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than the particular powers and duties conferred by the same statute.

45. Before the 1994 amendments to Section 624.5091(3), Florida Statutes (1993), the retaliatory tax imposed by (1) of the statute did "not apply as to . . . special purpose obligations or assessments imposed by another state in connection with" workers' compensation insurance.

46. Before the decision in Department of Revenue vs. Zurich Insurance Company, 667 So. 2d 365 (Fla. 1st DCA 1995), the DOR's Florida Administrative Code Rule 12B-8.016(3)(a)(4) provided that assessments imposed by other states which were comparable to the Workers' Compensation Administrative Assessment (WCAA) imposed by Section 440.51, Florida Statutes, shall be included in the calculation of the retaliatory tax provided in Section 624.5091, Florida Statutes (1993).

47. In Zurich, a DOAH Hearing Officer invalidated the DOR's Florida Administrative Code Rule 12B-8.016(3)(a)(4) as an unlawful exercise of delegated legislative authority because the WCAA was a special purpose obligation or assessment and, under Section 624.5091(3), Florida Statutes (1993), the retaliatory tax did not apply as to assessments imposed other states which were comparable to the WCAA. The DOR appealed, and the Zurich court agreed with the Administrative Law Judge and affirmed the final order.

Zurich Controls;
WCAA are Special Purpose Obligations or Assessments

48. FMIC and AAI argue primarily that the Zurich decision was wrong, or that it does not control Section 624.5091(3), Florida Statutes (1995). But Zurich's efficacy does not depend on its correctness; regardless whether it is wrong, it is controlling precedent in this proceeding. See Stanfill vs. State, 384 So. 2d 141, 143 (Fla. 1980). And the deletion of the words "by another state" from the statute in 1994 is not a valid reason to conclude that WCAA are not "special purpose obligations or assessments imposed in connection with" workers' compensation insurance under Section 624.5091(3), Florida Statutes (1995). It must be concluded that they are.

49. Even if Zurich did not control, Section 440.51(5), Florida Statutes (1995), would not require the conclusion that WCAA are not "special purpose obligations or assessments imposed in connection with" workers' compensation insurance under Section

624.5091(3), Florida Statutes (1995). Section 440.51(5) provides only that they "shall be allowed as a deduction against the amount of any other tax levied by the state upon the premiums, assessments, or deposits for workers' compensation insurance on contracts or policies of said insurance carrier, self-insurer, or commercial self-insurance fund." The retaliatory tax imposed under Section 624.5091(3), Florida Statutes (1995), is not a tax "upon the premiums, assessments, or deposits for workers' compensation insurance on contracts or policies of said insurance carrier, self-insurer, or commercial self-insurance fund." It is a tax to counterbalance another state's imposition of an aggregate burden of taxes, licenses and other fees on Florida insurers which is greater than the aggregate burden of Florida's taxes, licenses and other fees on similar insurers of the other state. See Gallagher vs. Motors Ins. Corp., 605 So. 2d 62 (Fla. 1992). See also Western and Southern Life Ins. Co. vs. State Bd. of Equalization of Calif., 451 U.S. 648. 101 S.Ct. 2070, 68 L.Ed. 2d 514(1981).

Authority for Rulemaking Independent of Zurich

50. AAI contends that the Zurich decision is inadequate authority for promulgation of the proposed rules and proposed forms. But, clearly, the DOR's rulemaking authority does not derive from Zurich; it remains statutory. Rather, Zurich just told the DOR that its existing rules were invalid to the extent that they did not treat WCAA as "special purpose obligations or

assessments imposed in connection with" workers' compensation insurance.

Proposed Application of Retaliatory Tax is Correct

51. Since WCAA are "special purpose obligations or assessments imposed in connection with" workers' compensation insurance, the next question becomes whether the retaliatory tax is being applied as to WCAA under the proposed rules and forms. It is concluded that the retaliatory tax is not being applied as to WCAA under the proposed rules and forms. Rather, as authorized under Section 624.5091(1), Florida Statutes (1995), it is being applied as to the premium tax. The premium tax is the tax after applicable deductions and credits. As provided in Section 624.509(7), Florida Statutes (1995), the WCAA are deductions against the premium tax. The proposed rules and forms are consistent with these statutes.

52. As the DOR points out in its arguments, the proposed rules and forms do not change the way in which the retaliatory tax is applied to "special purpose obligations or assessments imposed in connection with particular kinds of insurance other than property insurance . . . ." Existing Florida Administrative Code Rules 12B-8.016(2) and (3) make it clear both that the DOR always has used the net premium tax as the starting point in determining retaliatory taxes and that "special purpose obligations or assessments imposed in connection with particular kinds of insurance other than property insurance" are not

included in retaliatory tax calculations. The proposed rules and forms merely follow Zurich by identifying WCAA as being such "special purpose obligations or assessments imposed in connection with particular kinds of insurance other than property insurance."

53. As the DOR further points out in its arguments, none of the Petitioners have directly challenged the validity of existing Florida Administrative Code Rules 12B-8.016(2) and (3). Any direct challenge to those rules has been waived. See Cole Vision Corp. vs. Dept. of Bus. and Prof. Reg., Bd. of Optometry, 688 So. 2d 404 (Fla. 1st DCA 1997). Those rules are presumed to be valid. See City of Palm Bay vs. Dept. of Transp., 588 So. 2d 624 (Fla. 1st DCA 1991); State Bd. of Optometry vs. Fla. Soc. Of Ophthalmology, 538 So. 878 (Fla. 1st DCA 1988). In addition, the Legislature has adopted the existing Florida Administrative Code Rules 12B-8.016(2) and (3) application of the retaliatory tax to "special purpose obligations or assessments imposed in connection with particular kinds of insurance other than property insurance" by reenacting the retaliatory tax statute several times since 1990 without modifying or rejecting the DOR's rules. See Szabo Food Services, Inc., vs. Dickinson, 286 So. 2d 529, 531 (Fla. 1973); Cole Vision Corp. vs. Dept. of Bus. and Prof. Reg., Bd. of Optometry, supra, at 408.

54. Existing Florida Administrative Code Rules 12B-8.016(2) and (3) control the application of the retaliatory tax as to

WCAA, and the proposed rules and forms are consistent with those rules.

Comportment with American Southern

55. AIA argues that the decision in American Southern Ins. Co. vs. Dept of Revenue, 674 So. 2d 810 (Fla. 1st DCA 1996), compels the conclusion that gross premium taxes must be used as the starting point in determining retaliatory taxes (or, alternatively, the WCAA deduction from gross premium taxes must be added back to net premium taxes.) But American Southern does not compel this conclusion. The American Southern decision turned upon a construction of the term "similar insurer" in Section 624.5091(1), Florida Statutes (1991). In that case, the a Georgia insurer filed suit to reduce the retaliatory tax sought to be imposed. The Georgia insurer contended that, in calculating Florida's retaliatory tax, the DOR should have used the net premium taxes it paid in Georgia, after taking advantage of a premium tax rate abatement provision under Georgia law for insurers investing at least 75% of its nonfederal assets in Georgia property—which reduced its Georgia premium tax rate from 4.75% to 3%. The American Southern court held that, compared to the Georgia insurer, a Florida "similar insurer" would be a Florida insurer that would not be able to take advantage of Georgia's rate abatement under Georgia law, so that the DOR properly used the higher 4.75% Georgia premium tax rate in calculating the Florida retaliatory tax due. The American

Southern court did not hold that net premium taxes should not be used as the starting point in determining Florida's retaliatory tax, or that the WCAA imposed under Section 440.51(1) should not be allowed as a deduction under Section 440.51(5) for purposes of calculating those net premium taxes. Arguably contrary dicta in American Southern is not controlling.

Support from Pacific Mutual

56. Strong support for the DOR's position is found in the decision in Pacific Mutual Life Ins. Co. vs. G. A. Bushnell, 396 So. 2d 253 (Ariz. 1964). In that case, Arizona's retaliatory tax statute had an exclusion for ad valorem taxes (as does Florida's), but its insurance premium tax statute provided no deduction or credit for ad valorem taxes against insurance premium tax payable in Arizona. Arizona tried to assess retaliatory taxes against a California insurer. Although California gave insurers such a credit for California's ad valorem taxes in computing insurance premium tax payable in California, Arizona contended that the credit should be added back in to the computation of California's insurance premium taxes for purposes of Arizona's retaliatory tax. The Arizona Supreme Court rejected the "add back" and held that the comparison should be on the basis of the "net" premium tax actually paid under California law.

LMIC and AAI Expressio Unius Argument

57. Instead of adopting AIA's American Southern argument,

LMIC and AAI attempt to advance the following intricate statutory construction argument. Section 624.5091(1), Florida Statutes (1995), provides that, in determining retaliatory taxes, 80% of the premium tax salary credit is not "taken into consideration." This is accomplished by adding 80% of that deduction back into the net premium tax. Under Section 624.5091(3), Florida Statutes (1995), the retaliatory tax is "not applied as to" personal income taxes, sales or use taxes, ad valorem taxes on real or personal property, reimbursement of premiums paid to the Florida Hurricane Catastrophe Fund, emergency assessments to the Florida Hurricane Catastrophe Fund, or "special purpose obligations or assessments imposed in connection with particular kinds of insurance other than property insurance," except that "deductions, from premium taxes or other taxes otherwise payable, allowed on account of real estate or personal property taxes paid shall be taken into consideration by the department in determining the propriety and extent of retaliatory action under this section." It is argued that, under the rule of statutory interpretation that "expressio unius est exclusio alterius," express mention of deductions for real estate or personal property taxes excludes deductions for any of the others listed under Section 624.5091(3), Florida Statutes (1995), as to which the the retaliatory tax is "not applied." See Thayer vs. State, 335 So. 2d 815, 817 (Fla. 1976).

58. Admittedly, it is not obvious why the concluding clause

of Section 624.5091(3), Florida Statutes (1995), only mentions real estate or personal property taxes. But it is concluded that, in the case of this statute, blithe resort to the "expressio unius" doctrine exclusively is not the appropriate way to ascertain the legislative intent. Other guides to the legislative intent--such as the doctrine of deference to interpretations given by the agency authorized by statute to administer the statute and the doctrine of legislative reenactment--also must be taken into account. See Szabo Food Services, Inc., vs. Dickinson, supra; Cole Vision Corp. vs. Dept. of Bus. and Prof. Reg., Bd. of Optometry, supra. Even without legislative reenactment, there is the rule of statutory interpretation that deference is to be given to reasonable and not clearly erroneous agency interpretations of ambiguous statutes administered and enforced by the agency, as well as the agency's own rules promulgated under those statutes. See PW Ventures, Inc. vs. Nichols, 533 So. 2d 281 (Fla. 1988); Fla. Institutional Legal Services, Inc., v. Fla. Dept. of Corrections, 579 So. 2d 267 (Fla. 1st DCA 1991); Skiff's Workingman's Nursery vs. Dept. of Transp., 557 So. 2d 233, 234 (Fla. 4th DCA 1990); Sunshine Jr. Stores, Inc., vs. Dept. of Environmental Reg., 556 So. 2d 1177 (Fla. 1st DCA 1990); Tri-State Sys., Inc. vs. Department of Transp., 491 So. 2d 1192 (Fla. 1st DCA 1986); Shell Harbor Group vs. Dept. of Business Reg., 487 So. 2d 1141 (Fla. 1st DCA 1986); Dept. of Professional Reg., Bd. of Medical

Examiners vs. Durrani, 455 So. 2d 515, 517 (Fla. 1st DCA 1984); Dept. of Admin. vs. Nelson, 424 So. 2d 852, 858 (Fla. 1st DCA 1982); Dept. of Health, etc., vs. Framat Realty, Inc., 407 So. 2d 238, 241 (Fla. 1st DCA 1981).

AIA's Legislative History Argument

59. AIA also argues that the Fiscal Comments to the House of Representatives Insurance Committee Final Staff Analysis and Economic Impact Statement for CS/CS/CS/HB 336 in 1989 indicate legislative intent that gross premium taxes be used as the starting point in determining retaliatory taxes (or, alternatively, the WCAA deduction from gross premium taxes be added back to net premium taxes.) To the contrary, the analysis makes it clear that WCAA are properly deductions from insurance premium taxes. The analysis starts out by stating that CS/CS/CS/HB 336 reduces the insurance premium tax rate and alters certain credits against the tax. It repeatedly shows how the premium tax is reduced by various credits, including the WCAA.

60. On first blush, it might appear that the hypothetical example in the fiscal comments assumes the calculation of retaliatory taxes based on the difference between gross premium tax percentages in Florida and in a hypothetical foreign state. But it is more likely that, unlike for its demonstration of the effect of the salary credit on the insurance premium tax and the retaliatory tax, the fiscal comments assume an identical WCAA deduction in the hypothetical foreign state and compare gross

premium tax percentages in Florida and in the hypothetical foreign state as a simplified way of generally showing the fiscal impact on Florida insurers from the amendments to the premium tax statutes proposed in the legislation. As with the expressio unius doctrine, it is concluded that the fiscal comments are not a clear enough expression of legislative intent to override all the other indications that "special purpose obligations or assessments imposed in connection with particular kinds of insurance other than property insurance" are intended to be deductions from the insurance premium tax, that net premium tax is the proper starting point for calculating the retaliatory tax, and that "special purpose obligations or assessments imposed in connection with particular kinds of insurance other than property insurance" should not be added back to the premium tax for purposes of calculating the retaliatory tax.

Reconciling Facially Conflicting Legislative Goals

61. The final statutory argument advanced by AIA, LMIC, and AAI is essentially that implementation of Florida's retaliatory tax using the proposed rules and forms would undo the Florida Legislature's intent to ease the insurance premium tax burden on foreign insurers offering workers' compensation insurance in Florida. It suffices to say that the Florida Legislature also clearly intends to impose a retaliatory tax where a foreign insurer's domicile state imposes on Florida insurers doing business in the foreign state a greater aggregate tax burden than

Florida would otherwise impose on the foreign insurer doing business in Florida.

No Constitutional Impediment

62. AIA also contends that the implementation of Florida's retaliatory tax using the proposed rules and forms would be unconstitutional because it would deny foreign insurers equal protection. But the argument is based on an erroneous premise. As implemented by the proposed rules and forms, Florida's retaliatory tax would not treat Florida and foreign insurers differently. Both would get the advantage of a deduction for WCAA and other "special purpose obligations or assessments imposed in connection with particular kinds of insurance other than property insurance" from Florida's insurance premium taxes, and such deductions allowed in a foreign state against its insurance premium taxes would be treated the same way for purposes of calculating Florida's retaliatory tax. See Western and Southern Life Ins. Co. vs. State Bd. of Equalization of Calif., supra; American Southern Ins. Co. vs. Dept of Revenue, supra; Gallagher vs. Motors Ins. Corp., supra. This is not a case where Florida's retaliatory tax is being imposed "beyond the point of equalization solely to generate revenue at the expense of foreign insurers . . .." Contrast United States Automobile Ass'n vs. Curiale, 668 N.E.2d 384, 388 (N.Y. 1996).

Public Notice was Adequate

63. AAI argues that the DOR's notice of its intent to adopt

the proposed rules and forms was inadequate under Section 120.54(3)(a)1., Florida Statutes (Supp. 1996). That statute requires notice to set forth "a short, plain explanation of the purpose and effect of" the proposed rules and forms. AAI concedes the adequacy of the notice of the purpose of the proposed rules and forms but contends that notice of their effect was inadequate.

64. The "Purpose and Effect" section of the DOR's publication in the Florida Administrative Weekly stated:

> The proposed amendments to Rule Chapter 12B-8, F.A.C., are needed to implement various recent court decisions, delete obsolete language, provide definitional language concerning "multiperil insurance," and clarify which insurers are subject to the tax imposed under s. 624.509, F.S., and how they are to calculate taxable premiums and allowable credits.

The "Summary" section of the publication also stated that Florida Administrative Code Rule 12B-8.016 was being revised "to incorporate statutory or procedural changes made since the last rule revision and to delete obsolete language within these rules." Elsewhere in the notice, the law implemented was cited, including Sections 624.509 and 624.5091, Florida Statutes (1995). Finally, the notice specified the rule amendments, striking through the deleted language and underlining added language.

65. It is concluded that this notice was adequate. It was not a defect for the same information in the "Purpose and Effect" section of the publication to give notice of both the purpose and effect of the proposed rules and forms. In any event, the

citation to Sections 624.509 and 624.5091, Florida Statutes (1995), as the law implemented would cure any defect in the "Purpose and Effect" section of the notice. See Agency for Health Care Admin. vs. University Hosp., Ltd., 670 So. 2d 1037 (Fla. 1st DCA 1996). So would the specification of the proposed changes to the language of the rule. See Final Order, Fla. Society of Ophthalmology vs. Dept. of Prof. Reg., DOAH Case No. 87-1743RX, 10 F.A.L.R. 438, entered December 2, 1987.

No Issue as to Effective Date

66. The Petitioners contended in these proceedings that the proposed rules and forms could not be applied prior to being noticed. Without conceding the legal point, the DOR stipulated in the Prehearing Stipulation, at final hearing, and in its post-hearing submissions that they would apply effective January 1, 1997, making the retroactive application arguments moot. (The DOR continues to maintain that the legal consequence flowing from the decisions in Zurich and American Southern are effective on the dates of those decisions.)

DISPOSITION

Based on the foregoing Findings of Fact and Conclusions of Law, the proposed rule challenge petitions filed in these proceedings are denied, and the DOR's proposed Florida Administrative Code Rules 12B-8.003 and 12B-8.016 and proposed Forms DR-907 and DR-908 are declared valid.

DONE AND ORDERED this 29th day of August, 1997, in Tallahassee, Leon County, Florida.

J. LAWRENCE JOHNSTON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of August, 1997.

ENDNOTES

[1]Florida's retaliatory tax statute was renumbered in 1959, 1989 and 1990 as follows: §626.061, Florida Statutes (1959), renumbered §624.429, Florida Statutes (1989), renumbered §624.5091, Florida Statutes (1990).

[2]Prior to 1994, Section 624.5091(3) read:

> This section does not apply as to personal income taxes, nor as to ad valorem taxes on real or personal property, nor as to special purpose obligations or asessments imposed by another state in connection with particular kinds of insurance other than property insurance, except that deductions, from premium taxes or other taxes otherwise payable allowed on account of real estate or personal property taxes paid shall be taken into consideration by the department in determining the propriety and extent or retaliatory action under this section (emphasis supplied).

[3]Section 213.05 directs the Department of Revenue to administer provisions of §§624.509 through 624.514. Section 213.06(1) authorizes the Department of Revenue to promulgate rules to implement those responsibilities.

[4]Zurich Insurance Company vs. Department of Revenue, DOAH

Case Number 94-5075RX.

[5]Florida Administrative Weekly, Volume 22, Number 52, December 27, 1996.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a notice of appeal with the Agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.